APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1969
No. 399

DANIEL ROWAN, dba AMERICAN BOOK SERVICE, *et al.*,
Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

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APPENDIX.

Chronological List of Relevant Docket Entries.

Sept. 18, 1968—Plaintiff's original Complaint and Petition for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunction and Request for Three-Judge Court to Declare Title 39 U.S.C. 4009 Unconstitutional filed in the United States District Court, Central District of California. Filed simultaneously therewith, Affidavit of Joseph Taback in support of Complaint and Petition for Declaratory Relief, Temporary Restraining Order, Preliminary and Permanent Injunction, Notice of Motion and Motion for Granting of Preliminary Injunction With Points and Authorities in Support Thereof returnable October 28, 1968, 10:00 a.m.

Sept. 23, 1968—Notification and Certificate of Judge Real for a Three-Judge Court filed and a copy mailed to Judge Chambers, Presiding Judge of the Circuit Court of Appeals for the ..... Circuit.

Oct. 7, 1968—Summons returned and filed. Service as to all defendants.

Oct. 14, 1968—Order on Court's own Motion that hearing of Plaintiff's Motion for Preliminary Injunction set for Oct. 28 is continued to Nov. 4, 1968 at 10:00 a.m.

Oct. 18, 1968—Plaintiff's Notice of Continuance of Hearing from Oct. 28, 1968 to Nov. 4, 1968 filed.

Oct. 22, 1968—Defendants' Motion to Dismiss and Notice of Motion thereof and Order Prescribing Time for Hearing returnable Nov. 4, 1968 filed. Filed concurrently therewith Defendants' Memorandum in Op-

position to Plaintiff's Motion for a Preliminary Injunction and in Support of Defendants' Motion to Dismiss. Copies sent to Judges Real, Carr and Hufstedler.

Oct. 23, 1968—Stipulation and Order that time for Defendants' to file their opposition to Plaintiff's motion for granting of preliminary injunction be extended to and including Oct. 21, 1968, and that the Plaintiffs may have until Oct. 28, 1968 to file their Reply thereto filed. Copies thereof sent to Judges Real, Carr and Hufstedler.

Oct. 28, 1968—Plaintiff's Memorandum in Support of Plaintiff's Motion for Preliminary Injunction and Declaration that 39 U.S.C. 4009 is Unconstitutional together with Affidavits of Lee Jay Winkler, Virginia Ann Yedding, Molly Fontenot, and Floyd Clemens filed. Copies thereof sent to Judges Real, Carr and Hufstedler.

Nov. 4, 1968—Hearing on Plaintiff's Motion for Preliminary Injunction and Defendants' Motion for Dismissal and Order held and the cause stands submitted.

April 30, 1969—Memorandum of Decision and Order Thereon that judgment be in favor of Defendants and that the Action be dismissed filed and entered. Copies mailed and parties notified.

May 22, 1969—Specially Concurring Memorandum Opinion of Shirley M. Hufstedler, Circuit Judge filed.

May 28, 1969—Plaintiff's Notice of Appeal filed. Copies thereof mailed to Judges Real, Carr and Hufstedler. Filed concurrently therewith, Plaintiffs Proof of Service re Notice of Appeal.

May 29, 1969—Copies of the Memorandum Decision of Judge Hufstedler filed May 22, 1969, mailed to all counsel and copies to Judges Carr and Real.

June 3, 1969—Plaintiffs and (Appellants herein) request and designation of record to be prepared, certified and transmitted to the U.S. Supreme Court filed, together with Proof of Service.

June 18, 1969—Judgment dismissing action on the merits and that plaintiff take nothing and that judgment is filed Nunc Pro Tunc as of April 30, 1969, filed and entered.

July 22, 1969—Original record on appeal issued and forwarded to the United States Supreme Court.

Complaint and Petition for Declaratory Relief, Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Request for the Convening of a Three Judge District Court Forum to Declare 39 U.S.C. 4009 Unconstitutional.

United States District Court, Central District of California.

Daniel Rowan doing business as American Book Service, Donald Barrsuglia doing business as CAL-SUR Co., Chris Warfield doing business as Home Products, Ronald Stuart doing business as Ras Enterprises-Daro Industries, Pete Christo doing business as Athena Products, Sol Resnick doing business as Cameo Distributors, William Young doing business as Bilthels Mailing Service, Floyd Clemens doing business as Tiffany Enterprises, Lejay Winkler doing business as Quality Products, Kevin Curley doing business as Media Consultants, Lambert Fontenot doing business

as United Surgical, Ralph Leverson doing business as Premier Products, Norman Arno doing business as Norman Stacy & Associates, Norman Arno doing business as C & A Sales, and Eve Miller, Plaintiffs, vs. United States Post Office Department; United States Postmaster General, W. Marvin Watson; Attorney General of United States, Ramsey Clark, Defendants. No. 68-1562-R.

Filed, Sept. 18, 1968.

I

DANIEL ROWAN doing business as AMERICAN BOOK SERVICE, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

II

DONALD BARRSUGLIA doing business as CAL-SUR CO., (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

III

CHRIS WARFIELD doing business as HOME PRODUCTS, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

IV

RONALD STUART doing business as RAZEN-TERPRISES-DARO INDUSTRIES, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

V

PETE CHRISTO doing business as ATHENA PRODUCTS, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

VI

SOL RESNICK doing business as CAMEO DISTRIBUTORS, (hereinafter referred to collectively as "petitioner") was at all times material hereto doing business in the State of California in the Central District of California.

VII

WILLIAM YOUNG doing business as BILTHELS MAILING SERVICE (hereinafter referred to collectively as "petitioners"), was at all times material hereto doing business in the State of California in the Central District of California.

VIII

FLOYD CLEMENS doing business as TIFFANY ENTERPRISES, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

IX

LEJAY WINKLER doing business as QUALITY PRODUCTS, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

X

KEVIN CURLEY doing business as MEDIA CONSULTANTS, (hereinafter referred to collectively as

"petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

XI

LAMBERT FONTENOT doing business as UNITED SURGICAL, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

XII

RALPH LEVERSON doing business as PREMIER PRODUCTS, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

XIII

NORMAN ARNO doing business as NORMAN STACY & ASSOCIATES, (hereinafter referred to collectively as "petitioner"), was at all times material hereto doing business in the State of California in the Central District of California.

XIV

NORMAN ARNO doing business as C & A SALES, (hereinafter referred to collectively as "petitioner") was at all times material hereto doing business in the State of California in the Central District of California.

XV

EVE MILLER (hereinafter referred to collectively as "petitioner") was at all times material hereto doing business in the State of California in the Central District of California.

XVI

The action arises under the Constitution of the United States, Article I, Section 8; the First and Fifth Amendments of the Constitution of the United States; under Title 28 of the United States Code, Section 1338, which states that "the District Courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service".

XVII

At all times material hereto, petitioners and each of them, were engaged and presently are engaged in the mail order business, and that the petitioners and each of them, at all times material hereto, did as part of said mail order business, distribute, mail, and sell items, books, and materials through the United States mail, and the petitioners, and each of them, did further distribute, mail, sell their respective items, books, and materials by virtue of advertisements, mailed and distributed through the United States mail.

XVIII

That several of the petitioners herein are further engaged in the business of buying and selling names and lists of names for the purposes of distributing same to mail order houses, book sellers, and magazine publishers throughout the United States. Further, the petitioners and each of them, have engaged in their respective businesses for many years prior to the filing of this action.

XIX

That on or about December 16, 1967, Public Law 90-206 was enacted by the Congress of the United States and is presently designated as Section 4009 of the United States Code, Title 39, and that said public

law did become effective on the 15th day of April, 1968; that a copy of said law is attached hereto and marked Exhibit "A" [deleted herein] and by reference to said Exhibit "A", [deleted herein] incorporated herein as though fully set forth verbatim.

XX

The petitioners and each of them, have received prohibitory orders issued by the Postmaster General, by and through his agents and servants, the local postmasters; several of the petitioners herein are awaiting administrative hearings pursuant to said Section 4009 of the United States Code, Title 39, and one of the petitioners herein, namely LAMBERT FONTENOT doing business as UNITED SURGICAL, is awaiting the issuance of an order that is being threatened to be obtained by the United States Attorney General from a District Court that would direct that petitioner comply with Section 4009 of the United States Code, Title 39, in all its particulars.

XXI

Said Section 4009 of the United States Code, Title 39, is null and void in that that said law, its implementation, enforcement, and administration violates the petitioners and each of their constitutional rights in that it is particularly violative of the First Amendment of the Constitution of the United States and violative of the Fifth Amendment of the Constitution of the United States in that each of the aforesaid matters and things violates petitioners and each of their right to free speech as well as due process of law. Said Section 4009 of the United States Codes, Title 39, is further vague, ambiguous, uncertain, and without standards, and that it provides for an unlawful delegation

of powers in complete derogation of the Constitution of the United States.

XXII

That the petitioners, and each of them, will be threatened during the pendency of this action by the defendants, their agents, representatives, servants, and attorneys, and each of them, with the continuous implementation, enforcement and administration of Section 4009 of the United States Code, Title 39, and that the continued enforcement, implementation and administration of said law will cause petitioners, and each of them, great and irreparable harm and injury, and that the petitioners, and each of them, have no plain or speedy or adequate remedy at law by which to remedy said acts by the defendants, and each of them.

XXIII

Petitioners, and each of them, respectfully request that pursuant to Title 28 of the United States Code, Sections 2882 and 2284, that a three-judge United States District Court be convened to hear and determine each and every issue raised herein, including, but not limited to, the issuance of temporary restraining orders, preliminary injunctions, permanent injunctions, and all other matters raised herein; petitioners allege and aver that the matters raised by petitioner's petition herein presents serious and substantial questions of constitutional rights and raise matters which are unsettled and yet undetermined, and further, petitioners herein seek to enjoin the enforcement, implementation, execution, and administration of said Federal Statute, namely Title 39 of the United States Code, Section 4009.

XXIV

Petitioners, and each of them, further request that the defendants, and each of them, their agents, servants, attorneys, and representatives be temporarily restrained during the pendency of this action as well as permanently enjoined from implementing, enforcing, administrating, acting upon, or demanding performance pursuant to said Section 4009 of the United States Code, Title 39, and that further, that said Section 4009 of the United States Code, Title 39, be declared null and void for any and all of the reasons set forth herein or any other reasons under the law.

WHEREFORE, your petitioner prays that the defendants herein, their agents, servants, attorneys, and representatives be temporarily restrained during the pendency of this action as well as permanently enjoined from enforcing, implementing, acting upon or demanding performance pursuant to said Section 4009 of the United States Code, Title 39, or any administrative determination and order predicated thereon.

That said Section 4009 of the United States Code, Title 39, be declared null and void for any and all of the reasons set forth herein or any other reason under the law.

GOLD, HERSCHER & TABACK
By /s/ JOSEPH TABACK
Joseph Taback

VERIFICATION

State of California, County of Los Angeles—ss

I am one of the plaintiffs in the above entitled action; I have read the foregoing COMPLAINT AND PETITION FOR DECLARATORY RELIEF, TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND REQUEST FOR THE CONVENING OF A THREE-JUDGE DISTRICT COURT FORUM, and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Executed this 17 day of September, 1968, at Beverly Hills, California.

/s/ NORMAN ARNO
NORMAN ARNO

Subscribed & Sworn to before me this 17 day of September, 1968. /s/ Helen Hess, Notary Public in and for said County and State.

Notice of Motion and Motion for Granting of Preliminary Injunction and Points and Authorities in Support Thereof.

United States District Court, Central District of California.

Daniel Rowan doing business as American Book Service, Donald Barrsuglia doing business as Cal-Sur Co., Chris Warfield doing business as Home Products, Ronald Stuart doing business as Ras Enterprises-Daro Industries, Pete Christo doing business as Athena Products, Sol Resnick doing business as Cameo Distributors, William Young doing business as Bilthels Mailing Service, Floyd Clemens doing business as Tiffany Enterprises, Lejay Winkler doing business as Quality Products, Kevin Curley doing business as Media Consultants, Lambert Fontenot doing business as United Surgical, Ralph Leverson doing business as Premier Products, Norman Arno doing business as Norman Stacy & Associates, Norman Arno doing business as C & A Sales, and Eve Miller, Plaintiffs, vs. United States Post Office Department; United States Postmaster General, W. Marvin Watson; Attorney General of United States, Ramsey Clark, Defendants. No. 68-1562.

TO THE UNITED STATES POST OFFICE DEPARTMENT, UNITED STATES POSTMASTER GENERAL, W. MARVIN WATSON, AND ATTORNEY GENERAL OF THE UNITED STATES, RAMSEY CLARK:

PLEASE TAKE NOTICE that on the 28th day of October, 1968, at 10.00 a.m., or as soon thereafter as counsel can be heard, petitioners,

DANIEL ROWAN doing business as AMERICAN BOOK SERVICE, DONALD BARRSUGLIA doing business as CAL-SUR CO., CHRIS WARFIELD doing business as HOME PRODUCTS, RONALD STUART doing business as RAS ENTERPRISES-DARO INDUSTRIES, PETE CHRISTO doing business as ATHENA PRODUCTS, SOL RESNICK doing business as CAMEO DISTRIBUTORS, WILLIAM YOUNG doing business as BILTHELS MAILING SERVICE, FLOYD CLEMENS doing business as TIFFANY ENTERPRISES, LEJAY WINKLER doing business as QUALITY PRODUCTS, KEVIN CURLEY doing business as MEDIA CONSULTANTS, LAMBERT FONTENOT doing business as UNITED SURGICAL, RALPH LEVERSON doing business as PREMIER PRODUCTS, NORMAN ARNO doing business as NORMAN STACY & ASSOCIATES, NORMAN ARNO doing business as C & A SALES and EVE MILLER, by and through their attorneys, GOLD, HERSCHER & TABACK, by JOSEPH TABACK, will move the Court, at courtroom No. ...., United States courthouse, 312 North Spring Street, Los Angeles, California, as follows:

1. To enjoin the defendants, and each of them, their agents, representatives, servants, and attorneys, both during the pendency of this action and permanently from enforcing, implementing, administering, acting upon, and demanding performance pursuant to Title 39, Section 4009 thereof of the United States Code.

This motion will be based upon this notice, the verified complaint and petition on file herein, the rec-

ords, files, Points and Authorities filed concurrently herewith, and the affidavit of Joseph Taback, Attorney at Law, in support of this motion filed herewith.

DATED: September 17, 1968.

GOLD, HERSCHER & TABACK
By /s/ JOSEPH TABACK
Joseph Taback

POINTS AND AUTHORITIES

I

The issuance of a temporary restraining order is within the discretion of the District Court.

Shannon vs. Retail Clerks International Protective Assn., 128 Fed. 2d, 553 (1942).

II

An applicant seeking injunctive relief need not prove a case which will entitle him to a decree after trial.

Burlington Mills Corp. vs. Roy Fabrics, 91 F.S. 39, affirmed 182 Fed. 2d, 1020.

III

A court has reasonable range of discretion in granting temporary injunctive relief and the measure of proof necessary to warrant relief need not be as great as that required for a final decree.

Douds vs. Knit Goods Workers Union, Local No. 155, Inter-National Ladies Garment Workers Union, AFL-CIO, 147 FS 345.

IV

The fact that a court may finally find the facts against plaintiff who procured temporary injunction does not compel a denial of temporary injunctive relief upon a proper showing.

Burton vs. Matanuska Valley Lines, Inc., 244 Fed. 2d, 647.

V

Even in the face of doubtful questions of law and fact, a motion for preliminary injunction will not be denied if the harm to plaintiff from such denial is sufficiently grave.

Mytinger and Casselberry, Inc. vs. Numanna Laboratories Corp., 215 Fed. 2d, 382.

Respectfully submitted,

GOLD, HERSCHER & TABACK
By /s/ JOSEPH TABACK
Joseph Taback

Order Designating United States Circuit Judge and United States District Judges Pursuant to §2284, Title 28, United States Code.

Whereas, in my judge the public interest so requires, I, pursuant to the provisions of §2284, Title 28, United States Code, do hereby designate and appoint the

HONORABLE SHIRLEY M, HUFSTEDLER,

United States Circuit Judge for the Ninth Circuit, and the

HONORABLE CHARLES H. CARR

and the

HONORABLE MANUEL L. REAL,

United States District Judges for the Central District of California, to hold district court for the Central District of California at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

> Daniel Rowen, dba American Book Service, et al, v. United States Post Office Department, et al, No. 68-1562-R.

and all motions and proceedings therein

DATED: October 2, 1968.

RICHARD H. CHAMBERS
Chief Judge, Ninth Circuit

Filed Oct. 3, 1968.

cc: Judge Hufstedler
cc: Judge Carr
cc: Judge Real
cc: Clerk, CDCal.
cc: Clerk, 9 CA

Affidavit of Floyd Clemens.

United States District Court, Central District of California.

Daniel Rowan, d/b/a American Book Service, et al., Plaintiffs, vs. United States Post Office Department, United States Postmaster General, W. Marvin Watson, Attorney General of the United States, Ramsey Clark, Defendants. Civil No. 69-1562-R

State of California, County of Los Angeles—ss

FLOYD CLEMENS, being first duly sworn, deposes and says:

That I am a plaintiff in the above-entitled matter. I am presently doing business as Tiffany Enterprises. Tiffany Enterprises is in the business of renting mailing lists, as well as in the direct mail order business.

The mailing lists involved in our business consist of approximately one hundred fifteen (115) lists. Each list contains between 20,000 and 25,000 names. The names are not in alphabetical or chronological order.

Lists are maintained on ozalid master sheets, and each sheet contains thirty three (33) names.

Each list has a letter code on the label indicating and designating which list and sheet the name is found upon. Only by reference to the code label which is affixed to the envelope which is mailed can we determine the name to which it refers itself. Without this label, a burden of almost insurmountable proportions is created to remove a name from a list.

My company by virtue of direct mailings, has received two hundred fifty (250) Prohibitory Orders. In addition, our company has received from other mail-

ers to whom our rental lists are rented, requests numbering in excess of three thousand (3,000) to have names removed from these lists. The cost over a five-month period has been approximately $350.00 to $500.00 per week. Our company has expended $7,000.00 in a five-month period.

On each occasion, we have requested the information designating the coded label in order to expedite our business procedures and processes in removing names of purported addresses who desire to have no further mail directed to them. It is only in rare instances and occasions that the coded label or the information designating the code is forwarded to us either by the addressee or the post master of the locale in which the addressee resides. There is virtually no attempt to cooperate by the addressees or the local postmasters to cause Section 4009 39 U.S. Codes to be workable.

The procedure, even if followed and facilitated by the information of receiving the coded label, would not place our company in a position of going to other lists and removing the addressee's name. Due to the fact that each list contains 20,000 to 25,000 names, the name could be removed only through great cost and tremendous expenditures of man hours.

In my experience in this business, people whose names appear on mail order lists have had their name placed thereon because they previously bought products or commodities as are advertised by a mail order house or they have made inquiries concerning commodities and products. Mail order lists are usually purchased with regard to the type of commodity or product that the sender desires to sell, and hence, the mail order lists rented or purchased or used contain names of per-

sons who have inquired or purchased similar commodities or products.

The procedure followed by my office is as follows:

Upon receipt of the Prohibitory Order, a postcard is mailed to both the person who received the mail and who has requested the Prohibitory Order and to the Postmaster in that locale that issued the Prohibitory Order requesting them to send us the code on the label of the mailing piece received. This is requested so that we may remove his name from our lists.

If the requested information is received by myself or my company, the name is then deleted from our mailing list and a letter is sent to the Postmaster advising him of the action taken. However, in the vast majority of situations we are never given the requested information, and we must again, and we do, send second postcards endeavoring to obtain the coded information in order to accomplish the purpose. In the event that a coded label or the coded information is received, if the list is not one of ours, we immediately write to the person from whom the list was rented and advise them to delete the name from the list.

s/FLOYD CLEMENS
Floyd Clemens

Subscribed and sworn to before me this 28 day of October, 1968.

/s/ HELEN HESS
Notary Public in and for said
County and State.

[Proof of Service by mail deleted]

Affidavit of Virginia Ann Yedding.

United States District Court, Central District of California.

Daniel Rowan, d/b/a American Book Service, et al., Plaintiffs, vs. United States Post Office Department, United States Postmaster General, W. Marvin Watson Attorney General of the United States, Ramsey Clark, Defendants. Civil Action No. 68-1562-R.

Filed, Oct. 28, 1968.

State of California, County of Los Angeles—ss

VIRGINIA ANN YEDDING, being first duly sworn, deposes and says:

That I am a partner in the business of NORMAN ARNO & ASSOCIATES. I am familiar with the work and operations of that company.

Since the enactment of 39 U.S.C. §4009, our company has received between 10 to 50 Prohibitory Orders per week. Due to this fact we have hired two additional employees at a cost of in excess of $150.00 per week, from that time to the present time. One Prohibitory Order by itself can take in excess of one hour of work in order to locate the name, if it at all can be found.

The lists which are used by our company contain an average of 15 to 20 thousand names. These names are not in alphabetical or chronological order. A coded label is used in the addressing and mailing of materials and that code is necessary in order to delete the name of any addressee.

One of the companies in which I am associated and which is a plaintiff herein went to hearing on one of the complaints issued pursuant to this law. The deci-

sion in that hearing is virtually identical to the decision made in the Quality Products hearing. Exhibit "E" attached to the Affidavit of Lejay Winkler represents in word substance and effect the decision rendered against C & A Products.

All the people to whom mailings are sent are people who have ordered adult material at one time or another and the names are not selected from any other sources.

The law as enacted and as enforced imposes upon our companies an insurmountable and onerous burden. If made to comply with the terms and provisions of the law, we are threatened with the loss of our business and investments.

In addition, by virtue of the number of Prohibitory Orders received, we are aware that there will be countless hearings in which we will be involved and that said procedures will create a staggering financial burden and obligation.

Unless the defendants are enjoined, great and irreparable harm and injury will occur to us and our companies with no available remedy or right in order to rectify the situation.

s/VIRGINIA ANN YEDDING
Virginia Ann Yedding

Subscribed and sworn to before me this 28th day of October, 1968.

s/ HELEN HESS
Notary Public in and for said
County and State.

[Proof of service by mail deleted]

Affidavit of Lejay Winkler.

United States District Court, Central District of California.

Daniel Rowan, d/b/a American Book Service, et al Plaintiffs, vs. United States Post Office Department, United States Postmaster General, W. Marvin Watson; Attorney General of the United States, Ramsey Clark, Defendants. Civil No. 68-1562-R.

State of California, County of Los Angeles—ss

LEJAY WINKLER, being first duly sworn, deposes and says:

That I am doing business under the name and style of Quality Products and am one of the plaintiffs herein. Quality Products is and was at all times mentioned hereto in the mail order business. From the time that 39 U.S. Code 4009 became effective, my company has rented mailing lists from different companies and has thereby rented a total of four hundred ten thousand three hundred forty five (410,345) names. We have received approximately one thousand (1,000) Prohibitory Orders since April 1968. The 410,345 names were derived from a total of one hundred eleven (111) different lists.

These lists do not contain names in alphabetical order or any semblance of order. The lists consists of ozalid sheets and the names contained therein are in the form of labels to be affixed to envelopes.

Many of the people who have requested Prohibitory Orders and whose Prohibitory Orders were directed to us, have in fact ordered materials and merchandise from our company. They, thereby have caused their names to be placed on lists.

Many of the Prohibitory Orders that are issued are at the request of wives of customers, although it is not the customer himself, who is requesting the Prohibitory Order.

The cost in attempting the process of deleting names pursuant to prohibitory orders received has been approximately five ($5.00) Dollars per name. In addition, there are many man hours expended by the sole proprietor and family in attempting to meet the imposed obligation of 39 U.S. Code 4009, for which out-of-pocket money is not expended.

The procedure followed by our company when a Prohibitory Order is received is that a letter is sent to the postmaster involved requesting the information needed for the deletion of the name. A copy of that letter is attached hereto marked Exhibit "A". After that letter is sent, Prohibitory Order is then filed by last name. We file this by last name rather than number because we have found that each of the local postmasters and post offices have different manners and ways of numbering Prohibitory Orders.

Ordinarily, no reply is received, or when a reply is received, it is generally not sufficient to determine what list the person's name was on. This is due to the fact that names are not maintained alphabetically or in any chronological order, but rather can only be traced by virtue of coded labels and coded information. Thereupon, the second letter is sent explaining the code situation, a copy of which is attached hereto and marked Exhibit "B".

The usual and customary time between the first and second letter is approximately thirty (30) days. This is critical due to the fact that we may have obtained

a list subsequent to the Prohibitory Order and performed a mailing. The addressee who requested the Prohibitory Order in question may have his name on the second list and will therefore receive advertising material. The advertising material may pertain to dissimilar, similar or identical advertising material as was subject to the original Prohibitory Order.

Oftentimes, we must forward a third request to the post office. A copy of that request is attached hereto and marked Exhibit "C".

Attached hereto and marked Exhibit "D" is a copy of the envelope in which advertising material is mailed by my company. The lower left hand corner of this envelope contains a notice to the addressee. The notice is self-explanatory, and indeed, if an addressee desires to solve the problem, he would abide by that notice and thereby simplify the entire procedure.

Under the present procedures and methods available in the mail order business, an almost insurmountable burden is created. Indeed, great and irreparable harm and injury is occurring to our business due to the fact that we cannot keep up with the Prohibitory Orders. This causes financial harm and loss to the business which cannot be recompensed by any remedy.

On October 8, 1968, my company went to hearing in the matter entitled, "In the Matter of Complaint against Quality Products, P. O. Box 1045, Hawthorne, California, Post Office Docket No. 15-2." This case presented the classical situation wherein because of noncooperation by the local postmaster, as well as an addressee, his name could not be deleted from the list from which his name was obtained from the first mailing. Subsequent to the said Prohibitory Order is-

sued, a new list was rented which was not under our control, either directly or indirectly, and a second mailing from that list was received by the addressee. A complaint issued thereon and the hearing was pursued.

At that hearing, no attorney appeared on behalf of the addressee or on behalf of the government. The regional counsel for this area served as the hearing officer. The hearing officer stated that pursuant to the procedures available to this type of hearing, no subpena process was available in order to bring the addressee to the hearing. The only evidence offered by the government was the request for the Prohibitory Order and that in fact same had been directed to our company.

Over numerous objections by our counsel, the hearing proceeded to its predestined conclusion. A copy of this decision is attached hereto and marked Exhibit "E".

The hearing officer ruled that any issues concerning the Constitutionality of the statute or the hearing procedures were beyond his scope of authority and refused to make any determination concerning same. The rules by which the hearing was conducted are attached hereto and marked Exhibit "F".

s/LEJAY WINKLER
Lejay Winkler

Subscribed and sworn to before me this 28th day of October, 1968.

s/ HELEN HESS
Notary Public in and for said
County and State.

EXHIBIT A

QUALITY PRODUCTS
P.O. Box 1045
Hawthorne, California

Dear Postmaster

I am in receipt of your Prohibitory Order No. ..... requesting the removal of the name.

The brochure clearly states the feeling of Quality Products regarding its mail. The notice on the brochure reads as follows:

> "We have neither the desire nor the intent to solicit minors or anyone who has no interest in this material. If you wish to have your name removed from the mailing list please notify us and return the coded mailing label on the envelope in which you received brochure."

I do not wish to invade in anyway the privacy of the above named nor anyone in their family. I have rented a list on a one time mailing basis on which this name appears.

I will be very glad to honor the wishes of the above if you would please send me the coded label. This is the only way the List Company is able to know the correct list the above name is on, and the label is urgently needed for the removal of this name.

Thank you for your co-operation.

Sincerely,

QUALITY PRODUCTS.

EXHIBIT B.

QUALITY PRODUCTS
P.O. Box 1045
Hawthorne, California

Dear Postmaster

Will you please provide me with the Return Key Number on the return envelope so the name

can re removed from the proper list.

Thank you.

QUALITY PRODUCTS

RETURN KEY NO.

EXHIBIT C.

QUALITY PRODUCTS
P.O. Box 1045
Hawthorne, California

Re: Prohibitory Order No.

Dear Postmaster:

To remove the above name, the following is needed.

1. If the label on the envelope has a label key, this is the only thing needed for removal.
2. If there is no label key number on the label, then the return key number shown on the lower left hand corner of the brown return envelope is needed.

Each mailer has a brown envelope enclosed with the contents, if there is no label key on the label, and the person filing a complaint has removed the return

envelopes (which has happened in many cases), then it is impossible to remove that persons name, for there would be no way to know which list his name appears on or which company the list was rented from.
Your co-operation regarding the above would greatly be appreciated.
Thank you.

QUALITY PRODUCTS.

EXHIBIT D.

[Envelope]

QUALITY PRODUCTS
P.O. Box 1045
Hawthorne, California 90250

FIRST CLASS MAIL
PERSONAL
NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED offer for Adult Merchandise. If you do not wish this mail, DO NOT OPEN! Simply mark this envelop "REFUSED", sign your initials and return to your Mailman. Upon the return of this envelope, we will endeavor to remove your name from our files. Thank you!

EXHIBIT E.

UNITED STATE OF AMERICA
POST OFFICE DEPARTMENT
DECISION

In the Matter of Violation of Prohibitory Order No. 37 Issued Against QUALITY PRODUCTS, P.O.

Box 1045, Hawthorne, CA 90250 *and agents or assigns,* pursuant to authority of Title 39, U.S. Code, § 4009. H. O. Docket No. 15-2, P.O. Docket No. 21.

HEARING:

10:00 A.M. on October 8, 1968 in room 1347, United States Court House Building, 312 North Spring Street, Los Angeles, California 90012. Gold, Herscher and Taback by Joseph Taback, Esq. for respondent.

Respondent having appeared at a hearing on the complaint and evidence having been received at the place and time set forth above, the Hearing Officer renders his decision:

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

/s/ J. RAFAEL RAMOS
Regional Counsel
631 Howard Street
San Francisco, California

Dated: Oct. 10, 1968.

EXHIBIT F.

RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO VIOLATIONS UNDER 39 U.S. CODE 4009

..... F.R. .....

39 C.F.R. Part 956

956.1 Authority for the Rules

The rules of practice are issued by the General Counsel of the Post Office Department pursuant to the authority delegated by the Postmaster General. (F.R.).

956.2 Scope of the Rules

The rules of practice shall be applicable to administrative hearings requested pursuant to 39 U.S. Code 4009(d). The provisions of Subchapter II of Chapter 5 (relative to administrative procedures) and Chapter 7 (relative to judicial review) of Part I of Title 5, U.S. Code, shall not apply to the (administrative) hearings conducted under 39 U.S. Code 4009(d).

956.2 Notice of Demand for Hearing

(a) Respondent served with a complaint by the postmaster charging violation of 39 U.S. Code 4009, may request a hearing on the issues. The mailer shall file a written request for such hearing with the postmaster no later than 15 days from the date of receipt of a complaint issued pursuant to *Paragraph (d) of 39 U.S. Code 4009.*

(b) The postmaster, upon receipt of a request for a hearing from the respondent, shall promptly forward such request with the file in the matter to the appropriate regional counsel.

956.4 Notice of Hearing

(a) The regional counsel, upon receipt of the respondent's request for a hearing, shall serve upon the respondent, by registered or certified mail, a notice of hearing setting forth the date, time, and place of hearing, and the name of the hearing officer who will preside. A copy of the rules will accompany the notice of hearing.

(b) Whenever practicable, the hearing date will be within 30 days from date of the notice of hearing served on the mailer.

(c) Requests for continuances and extensions of the scheduled hearing date shall be filed with the hearing officer and such requests, within the discretion of the hearing officer, shall not be granted except for good and substantial reasons shown.

(d) The parties in the proceeding initiated under 39 U.S. Code 4009 shall be the mailer, referred to as "Respondent", and the postmaster, referred to as "Complainant".

956.5 Hearing Officers

The presiding officer at the hearing held hereunder shall be the appropriate regional counsel of the Post Office Department designated in accordance with *Section 956.4 of the Rules.*

956.6 Change of Place of Hearing

Requests for change of place of hearing based on good and substantial reasons therefor, may be filed with the hearing officer. Such requests may be granted or denied, within the discretion of the hearing officer, who shall consider the convenience and necessity of all parties concerned and the jurisdictional requirements.

956.7 Conduct of the Hearings

(a) Testimony shall be under oath and witnesses shall be subject to cross-examination.

(b) Hearings shall be stenographically reported by postal personnel, or if necessary, a contract reporter of the Post Office Department under the supervision of the hearing officer. Copies of the transcript shall be supplied to the parties to the proceeding by Post Office personnel at the rates provided by Section 113, Postal Manual, or if by the reporter, at rates not to exceed the maximum rates fixed by the contract between the Post Office Department and the reporter.

(c) A party may object to admissions of evidence and shall make a brief statement of the grounds for the objections. Formal exceptions to the rulings of the presiding officer are unnecessary.

(d) All relevant and material evidence is admissible, including hearsay evidence of a trustworthy nature.

(e) The Post Office Department is not authorized by law to issue subpoenas requiring the attendance or testimony of witnesses or the production of documents.

(f) The Post Office Department is not authorized to pay fees and expenses for the respondent's witnesses or for depositions requested by the respondent pursuant to *Section 956.8 of the Rules.*

956.8 Depositions

(a) Not later than 5 days after receipt of a notice of hearing by respondent under *Section 956.4 of the Rules,* either party may file with the hearing officer a request for the taking of testimony by deposition.

A copy of the request shall be served on complainant. Requests shall contain a statement under oath, signed by the respondent, setting out the reasons for the request, the time and place for the taking of depositions, the name and address of the person before whom the deposition will be taken, and the name and address of the witness or witnesses whose deposition or depositions are sought. The statement shall also show the relevancy of the testimony to be adduced. The granting or denying of the request shall lie within the discretion of the presiding officer.

(b) Parties shall have the right to examine witnesses at the taking of depositions and to interpose objections to questions. Testimony shall be under oath. The deposition officer shall file the testimony taken, as directed by order of the hearing officer.

(c) The party requesting the deposition shall pay all fees required to be paid to witnesses and the deposition officer.

(d) All or any part of the deposition may be offered in evidence at the hearing by any party and shall become part of the record in the proceeding. If the deposition is not offered and received in evidence, it shall not be considered part of the record.

956.9 Submission in Lieu of Testimony

(a) In lieu of presenting testimony at a hearing, the parties may, with the approval of the hearing officer, enter into a stipulation for the submission of verified documentary evidence to the hearing officer. The hearing officer will render a decision on the issue of alleged violation of 39 U.S. Code 4009 based solely on the evidence submitted.

(b) Submissions by the parties may be accompanied by a memorandum in support of respective positions on the issue or issues involved.

(c) A party against whom an adverse decision has been rendered by the hearing officer, may file an appeal from such decision, in accordance with *Section 956.12 of the Rules*

956.10 Consolidation

(a) Where the postmaster has issued an Order or Orders directed to the respondent, under 39 U.S. Code 4009, involving more than one designated address, the hearing officer may order a consolidation of the matter for hearing on the issues.

(b) In lieu of a consolidation order by the hearing officer, parties may undertake a stipulation providing for consolidation of the matter for hearing on the issues.

956.11 Decisions

The hearing officer shall render his decision at the conclusion of the hearing, or within a reasonable time after submission, pursuant to *Section 956.9 of the Rules.* In the alternative, the hearing officer may reserve his decision at the conclusion of the hearing and render a written decision within a reasonable time thereafter. Parties may be requested to submit briefs in support of recommended findings, at the discretion of the hearing officer.

956.12 Appeals

(a) A party may file an appeal from an adverse decision of the hearing officer. Appeals must be filed no later than 15 days from date of issuance of the hearing officer's decision. An appeal shall be initiated by the filing of a Notice of Appeal and supporting briefs,

with the Assistant General Counsel, Mailability Division, Post Office Department, Washington, D.C. 20260.

(b) The decision of the Assistant General Counsel, Mailability Division, shall be the final Departmental decision, from which no further appeal will lie.

956.13 Waiver of Right to Appeal

In the event the respondent files a response pursuant to *paragraph (d) of 39 U.S. Code 4009* and does not request a hearing on the issues, he shall be deemed to have waived the provisions of *Section 956.11 of the Rules,* in which event the determination by the complainant as to violation of 39 U.S. Code 4009 shall become the final Departmental decision, from which no appeal shall lie.

956.14 Settlement Agreements

(a) These rules do not preclude the disposition of any matter by agreement between the parties at any stage of the proceeding and in accordance with Paragraphs "(b)" and "(c)" below.

(b) Settlement agreements undertaken between the parties after filing of a demand for a hearing shall be subject to the approval of the hearing officer.

(c) Settlement agreements between the parties subsequent to the filing of an appeal shall be subject to approval of the appellate officer—the Assistant General Counsel, Mailability Division.

/s/ TIMOTHY J. MAY
Timothy J. May
General Counsel
Post Office Department

[Proof of service by mail deleted]

Affidavit of Molly Fontenot.

United States District Court, Central District of California.

Daniel Rowan, d/b/a American Book Service, et al., Plaintiffs, vs. United States Post Office Department, United States Postmaster General, W. Marvin Watson; Attorney General of the United States, Ramsey Clark, Defendants. Civil No. 68-1562-R

State of California, County of Los Angeles—ss

MOLLY FONTENOT, being first duly sworn, deposes and says:

That I am employed by United Surgical Company. I am familiar with the workings and operation of United Surgical Company. United Surgical Company is in the mail order business and in addition rents names for its own use with regard to the mailings it makes. United Surgical has also approximately ten (10) of its own lists that are used by itself and also rented to other companies. The rent received by United Surgical Company is based upon the number of names contained on the list. Therefore, the removal of each name from the list diminishes the value of the list. The lists used and referenced heretofore are not maintained in alphabetical or chronological order, but rather by coded letter and number. The names are typed on ozalid masters containing thirty three (33) names to a sheet and are coded.

From the time of the enactment of 39 U.S. Code 4009, United Surgical has received two thousand (2,000) Prohibitory Orders.

Upon receipt of each of the Prohibitory Orders, United Surgical Company mailed a postcard to both

the addressee and the Postmaster in the locale where the addressee resides. These postcards request that the coded label or the information containing the code be mailed to United Surgical. The purpose of this request is so that the name may be removed from the list. With the exception of possibly 100 occasions, this information is not forwarded to us, and hence, tremendous expenditure of dollars, manpower, effort and time must be expended in order to locate the name and remove it from the list in question.

When the name is deleted from the list, the Postmaster is notified by postcard. In the event that the name appeared on a list which was not ours but was namely rented by the company, then a notice is sent to the company from whom said list was rented to delete any name covered by a Prohibitory Order.

In the course of business, we may rent a list from a source on whose list appears a name which heretofore this affiant had had removed from another list rented from some other source. The second party renting us a list would have no knowledge or notice that a name was requested to be removed or ordered to be removed. The list contains between 20,000 and 25,000 names and it would impose an insurmountable burden to examine each list to ascertain whether there is contained on the new list a name which had previously been ordered removed by virtue of one of the 2,000 Prohibitory Orders heretofore received.

As of this time, it has cost the company in actual out-of-pocket dollars, a sum in excess of $5,000.00, not counting innumerable man hours which are expended by the principals and owners of the company

in an endeavor to comply with the law. The requirements and the conduct necessary to accomplish the purported end of the law have caused and will continue to cause irreparable and harmful injury and damage to the business of United Surgical.

The names contained on lists used in our business are rented to us upon the basis that the persons whose names appear thereon have either been purchasers or inquirers of similar products or commodities.

/s/ MOLLY FONTENOT
Molly Fontenot

Subscribed and sworn to before me this 28th day of October, 1968.

/s/ HELEN HESS
Notary Public in and for said
County and State.

[Proof of service by mail deleted]

Notice of Motion and Order Prescribing Time for Hearing.

United States District Court, Central District of California.

Daniel Rowan, d/b/a American Book Service, et Al., Plaintiffs, v. United States Post Office Department, United States Postmaster General, W. Marvin Watson; Attorney General of the United States, Ramsey Clark, Defendants. Civil No. 68-1562-R

To the plaintiff and to his attorneys, Gold, Herscher & Taback:

PLEASE TAKE NOTICE that the defendants will bring on for hearing, before the Honorable Manuel L. Real, United States District Judge, at 10:00 o'clock a.m., on Monday, November 4, 1968, in his courtroom, United States Court House, 312 North Spring Street, Los Angeles, California, the Motion of Defendants to Dismiss in Accordance With Rule 12(b) Federal Rules of Civil Procedure.

DATED: This 22nd day of October, 1968.

WM. MATTHEW BYRNE, JR.
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
/s/ LARRY L. DIER
LARRY L. DIER
Assistant U. S. Attorney

Attorneys for defendants.

ORDER PRESCRIBING TIME FOR HEARING

On motion of the defendant United States of America, and good cause appearing therefor,

IT IS HEREBY ORDERED that the motion of defendant United States of America to dismiss the complaint and action herein of the plaintiffs be set for hearing on Monday, November 4, 1968, at 10:00 o'clock a.m., at the place indicated in the Notice of Motion.

DATED: This day of October, 1968.

UNITED STATES DISTRICT JUDGE

Reporter's Transcript of Proceedings Partial

In the United States District Court, Central District of California.

Honorable Shirley M. Hufstedler, Ninth Circuit Court Judge, Honorable Charles H. Carr, District Court Judge, Honorable Manuel L. Real, District Court Judge.

Daniel Rowan, etc., et al., Plaintiff, vs. U. S. Post Office Department, et al., Defendants. No. 68-1562-R

Los Angeles, California
Monday, November 4, 1968

FLORENCE HANNICK
Official Reporter
432 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
Telephone: 622-3021

APPEARANCES:

For the Plaintiff: Gold Herscher & Taback, 8500 Wilshire Boulevard, Suite 703, Beverly Hills, California; by JOSEPH TABACK.

For the Defendant: Wm. Matthew Byrne, United States Attorney, Los Angeles, California 90012; by Larry L. Dier, Assistant United States Attorney, David J. Anderson, Assistant United States Attorney.

Los Angeles, California, Monday, November 4, 1968, 2:30 P.M.

JUDGE REAL: Mr. Anderson.

MR. ANDERSON: May it please the court: The Government's position I think is fairly well summarized

in our brief but I would like to respond to a few of the things Mr. Taback has said.

The first thing I think is to put in context what he speaks of as a coalition between First Amendment rights and a right of privacy.

The Government has taken the position in its brief that there is no First Amendment right to send material through the mail to an addressee who is offended by them and does not want to receive them.

JUDGE HUFSTEDLER: Of course, you have a problem with existing authorities on that part, don't you?

MR. ANDERSON: Which existing authorities?

JUDGE HUFSTEDLER: Lamont and others. Do you really seriously take the position that there is no First Amendment problem with respect to the sending of material of any kind through the mail leaving aside for the moment nonmailable matter.

MR. ANDERSON: I would take the position in general, of course, the Government cannot restrict the use of the mails. But when we are talking about a recipient who does not want to receive it I think the Government's enforcing the decision—

JUDGE HUFSTEDLER: Is that really the problem though? We start out with the assumption, do we not, that on both sides of the equation there was a right to send and there is a right to receive and correlatively a right not to send and a right not to receive. Those interests we will assume in abstract just exactly balance each other, do they not?

MR. ANDERSON: Yes.

JUDGE HUFSTEDLER: Assume there is an absolute 100 per cent right in the individual to say I shall not receive X material from anybody, from my ex-wife, through the mail. Assume that is an absolute right. Is that the problem?

The question is, is it not, the extent to which the Government through the use of the postal service and through the procedure which is established by the statute can or cannot implement the rights on either side; isn't that the problem?

MR. ANDERSON: I think that is the question.

JUDGE HUFSTEDLER: I think you can argue from the premise that it is a given, that the person at the other end of the mail box has an absolute right to say I shall not receive mail from X. We have already indicated the statute to you that affects that in any way, isn't that so?

MR. ANDERSON: That is right.

JUDGE HUFSTEDLER: Nobody really suggests that isn't so. The problem is whether or not the Government in the performance of this statute is acting in a way which is constitutionally impermissible as interference—with the interference of free speech.

MR. ANDERSON: I think the court has dealt with that in the case of Lamont vs the Postmaster General in which they ruled unconstitutional a statute in which the sender's mail was detailed until the recipient came into the post office and said I would like this.

JUDGE HUFSTEDLER: Precisely. What I am saying is while this is not the same thing as Lamont, the hypothetical I gave you of right versus no right

and right against right is clearly recognized implicitly and explicitly in Lamont, is it not?

MR. ANDERSON: That is correct.

JUDGE HUFSTEDLER: So the question is why and why not does this particular implication differ from Lamont. What is it the Government does or does not do which puts a different and perhaps chilling effect upon otherwise protectibly free flow of communication.

MR. ANDERSON: In Lamont I think it is clear that the burden was put on the addressee to come in and request delivery of his mail. And, of course, this had the correlative effect of getting his name on a list of people who wanted to receive foreign Communist propaganda which is something the average person might well not want to be on. In the case we are talking about the recipient merely tells the post office he doesn't want to receive any further mail from this person. The recipient makes a choice and the burden is not—

JUDGE HUFSTEDLER: It is true that Lamont casts the burden on one side of the equation we are assuming was equal. In this one the burden is cast on the other side of the equation, is it not?

MR. ANDERSON: I think that is true.

JUDGE HUFSTEDLER: Why is one not a greater interference than the other with the free flow of this expression?

MR. ANDERSON: The interest in the free flow of expression is presumptively more the listener and the listener can tune out on anybody he wants. He

does not have to listen to anything. He can turn off the radio. Here he can turn off the mail, as it were. This was not the case in the Lamont case where he had to affirmatively request that.

JUDGE HUFSTEDLER: Let's move to another point but related to the same point. That is the overbreadth problem which I discussed very briefly with your opponent. Do you or do you not read the provisions filed in subsection A as prohibiting all further mailings from that address or irrespective of what the content of the other material may be—

MR. ANDERSON: The Post Office takes the position that the act is to be read as all further mailings.

JUDGE HUFSTEDLER: Are you agreeing or disagreeing?

MR. ANDERSON: That is the position we are taking here. I am not saying that a court cannot construe it otherwise. But in the legislative history, which unfortunately I do not have a cite on, you will find some discussion of the fact that Congress was trying to avoid putting the United States in the position of judging what was similar material and what was not. They feel that would be a greater problem than the addressee by his own choice deciding who not to receive mail from.

JUDGE HUFSTEDLER: Do you rely on ny passage in the legislative history which says something like this? Does it make any difference that the future information happened to be from an addressor who was mailing campaign literature to the same people who theretofore he had mailed a sexually provocative bit of literature? Is there anything like that there?

MR. ANDERSON: Yes. As I say, we take the position that the Act means the sender cannot be mailed anything further. The addressee knows this.

JUDGE HUFSTEDLER: Isn't that the very thing that gets you in very deep waters indeed with respect to the First Amendment problem?

MR. ANDERSON: I don't think so. Again, this is the addressee's choice of who to receive mail from. He could tell the post office to cut off his mail entirely and cut off all kinds of campaign literature. The fact he cuts off mail from one particular sender has no more affirmatives than cutting off all the mail.

JUDGE CARR: Counsel, I want to ask you this. We have sort of been working in a vacuum here. This is an application or motion for preliminary injunction.

MR. ANDERSON: That is right, on the Government's motion to dismiss.

JUDGE CARR: On a motion to dismiss. I suppose we have to follow the Supreme Court, what is the name of the case, the case that holds you cannot dismiss it unless beyond all peradventure of a doubt there is no case that can be stayed. What is the name of that case?

At any rate, it comes to the point of where you can't dismiss cases practically at all any more.

But let me ask you this. Here is where the crux of the whole case lies if the facts come out, the order of the Postmaster General shall direct sender, also direct sender's agents to delete names designated addressees from the mailings. This has nothing to do with the mail.

MR. ANDERSON: It was Congress's considered opinion that was the only way to enforce the prohibition. If lists with persons' names were exchanged they would continue to receive offensive mail.

JUDGE CARR: Stepping on, to control by sender or agents and assigns further shall prohibit the sender and his agents or assigns from the sale, rental, exchange or other transaction involving mailing lists. Isn't that going beyond the purview of the Post Office Department? How do I get the authority to do the business as long as I don't put it in the mail?

MR. ANDERSON: That is what we pointed out. Congress has a right to vindicate rights of individual citizens. We are talking about a kind of privacy—

JUDGE CARR: I am talking about the power to stop me from having a list as long as I don't send through the mail. What can Congress do about it?

MR. ANDERSON: As I say, your Honor, first of all we take the position that there is ancillary to the postal power, it is the only way, in Congress's opinion, that they could prevent offensive mailing from getting to the complaining addressees—

JUDGE CARR: They can prohibit the mailing. Let's agree on it for the purpose of argument. They can agree to prohibit mailing but can they prohibit me from making a sketch that I may or may not send through the mail? Say it is a very vulgar sketch, something that would be obscene. They cannot touch it until I put it in the mail.

MR. ANDERSON: That is correct, if you are talking about the present obscenity law.

JUDGE CARR: I am talking about this present law here, has it gone too far.

MR. ANDERSON: I believe so. If Congress in its considered opinion decided the only way to prevent offensive mailings was to control the rental of these lists which, of course, are only used so far as we know in this regard for mailing, this is their purpose.

JUDGE CARR: How far does ancillary go? Does it go to the point to where you can obviate the function of the mail to keep me from sending matter through the mail? How far does ancillary go?

MR. ANDERSON: It goes so far as to require the deletion of the name of the objecting sender before the list is released to people who mail it to them.

JUDGE CARR: Do you get the authority under interstate commerce?

MR. ANDERSON: No, under Congress is the power or general power to pass legislation to protect the constitutional rights of citizens of this kind.

JUDGE CARR: The problem here is we are talking about two things. The first is that the power of Congress to say you will not send this through the post office, that is one; and, secondly, is this broad power thrown in here that says you can't even transfer, assign or deal in this. It seems to me you have a real problem there.

But the facts before us, I can say as far as I am concerned, the facts before us leave me cold.

JUDGE REAL: It may be a very juvenile example, but what Judge Carr is trying to say is can Congress pass a law in which the Postmaster General can say to this man, "You mail naughty material to this individual sender. Now you write one hundred times 'I won't send material to this man.'" Could the Postmaster General do that?

MR. ANDERSON: I don't believe he could but I don't believe that that is the same kind of section.

JUDGE REAL: Then where is the basis for jurisdiction to say how he can deal with his lists which are not subject to the post office regulations.

MR. ANDERSON: I merely repeat what I said.

JUDGE REAL: You might say you can't mail the list with the name on it but can he say you can't sell it to somebody, for instance, an organization which might specifically want the names which are deleted?

JUDGE HUFSTEDLER: This is directed to a further First Amendment problem, assuming we are dealing with the First Amendment at all. It is the same difficulty we started to discuss before. Even if you read the statute as broadly as you state that it should be read, including the regulations which have just been discussed by my colleagues, is or is not the statute overbroad and does or does it not have a chilling effect with respect to persons other than those who are within the statutory classification of those who send pandering statements? Does it really have a dampening effect on those who would be otherwise exercising the appropriate rights of free speech?

MR. ANDERSON: You mean other advertisers?

JUDGE HUFSTEDLER: I mean does the statute reach beyond or substantially beyond or at least potentially beyond the statutory classification which Congress purported to recognize and to control, i.e., those who send pandering advertisements on the one hand and those individual addressees who request the post office not to send further mailings of such materials to that addressee.

MR. ANDERSON: No, I don't think it can be read as going beyond that. For one think I would like to point out that this standard of pandering advertisements is, of course, objective. This is not up to the individual addressee.

JUDGE HUFSTEDLER: Correct. I think that is right. We start off with that proposition but when you read how mechanically the thing is put together, and there is a restriction on the sale and exchange of mailing lists and all of this kind of thing, there is nothing in that particular description which at least without interpretation is confined to he who has once mailed any pandering advertisements, objectively read by objective non-addressee standards. I think the difficulty which we are perceiving here is with respect to its implementation. The statute may be overbroad. And to have read it in such a way in your briefs to make it as broad as you conceivably can, as broad as the language will permit it to be construed as—

MR. ANDERSON: Your Honor is correct. Of course one subject to a prohibitory order could not transfer the list to anyone else whether or not they were mailing pandering advertisements.

JUDGE HUFSTEDLER: What effect do you think it may have, at least theoretically, that a person who is by no means a sender of a pandering advertisement may be the subject of a stop order because of the untrammeled authority of the addressee on the other end.

MR. ANDERSON: It is not untrammeled, it wouldn't be in effect as to anything but a pandering advertisement.

JUDGE HUFSTEDLER: I am having difficulty framing it because it is kind of a hard territory.

You agree with me that it is possible that an addressee may receive material which is not by anybody's rationality, nothing except his own, a pandering advertisement.

MR. ANDERSON: Right.

JUDGE HUFSTEDLER: And the determination of what is a pandering advertisement is not within the sole discretion. Third, is it not then conceivable that one who is not a pandering advertiser at all is subject to the stop order?

MR. ANDERSON: I don't think so, your Honor. If you are speaking of someone to whom the list has been transferred, of course, there is no prohibitory order outstanding against them.

MR. HUFSTEDLER: But he can't have gotten the transfer, the transfer cannot have been made.

MR. ANDERSON: He can get it if the name is deleted.

JUDGE HUFSTEDLER: Aren't you arriving back in a circle? I am assuming on this illustration that the person never was a pandering advertisement sender in the first place. The way the statute is framed, the way you read it means that a person who is not a pandering advertiser objectively viewed nevertheless cannot sell his mailing list with any name of a person who protested, is that not itself a chilling effect on the freedom of expression?

MR. ANDERSON: I am afraid I don't quite understand. Are you talking about a transaction in a mailing list after a prohibitiory order has been entered?

JUDGE HUFSTEDLER: Right.

MR. ANDERSON: You are saying the sender who has purchased the mailing list, let us say—

JUDGE HUFSTEDLER: I am saying that if the statute is read as broadly as you say it should that one who objectively at no time ever mailed any pandering advertisement is prohibited from selling a mailing list with an objective person's name on it, is prohibited in effect from buying one.

MR. ANDERSON: Not from buying one.

JUDGE HUFSTEDLER: Because the person can't sell it to him.

MR. ANDERSON: In effect he can't buy it because he is not prohibited from doing anything—

JUDGE HUFSTEDLER: We are talking about what effect the whole statutory scheme may have on the whole of our—

MR. ANDERSON: That is correct. The other mailers cannot get hold of the list.

JUDGE HUFSTEDLER: Even though the first mailer was not a pandering advertiser?

MR. ANDERSON: If the first mailer is not a pandering advertiser, if the one who is going to transfer the list was not a pandering advertiser no order should be entered and a court should not enforce the order if one is given. That would alleviate the problem.

JUDGE CARR: Aren't we really dealing in ethereal things? You know, this is a request for injunction. To act on an injunction there must be facts. I can't find anything about an order in here at all. I can't find any order of the Post Office Department, none has been set up.

MR. ANDERSON: There is no order in the plaintiff's papers, your Honor.

JUDGE CARR: If nobody has been ordered to do anything why are we here?

MR. ANDERSON: They are subject to prohibitory orders.

JUDGE CARR: I am subject to the criminal laws but we can't restrain the criminal laws because I am subjected. Everybody in this room is subjected to the criminal laws. If we don't go out and restrain them and start knocking out the law as unconstitutional because somebody—

MR. ANDERSON: I think your Honor is right. It merely requests the Postmaster General for an order merely authorizing it, there is no evidence.

JUDGE CARR: Have we ever reached a realization point?

MR. ANDERSON: I believe we have here, your Honor.

JUDGE CARR: That is the point I am concerned with. Have we risen to the area of constitutional issue? I think we would have a constitutional issue. If you don't get to the second part of C where it says they can't transfer lists and things of that kind, if you show me an order which prohibits that, that is something different. But I haven't seen such an order.

JUDGE HUFSTEDLER: Let me put this to you. Once any single addressee has sent in a complaint requesting his name to be eradicated, is there anything between that motion and the issuance of an order?

MR. ANDERSON: No, there is not.

JUDGE HUFSTEDLER: Doesn't it follow automatically?

MR. ANDERSON: It does.

JUDGE HUFSTEDLER: All right. Now, in order to have a justiciable issue must one go beyond the order stage and if so, why?

MR. ANDERSON: Well, there is, as we point out in our briefs, there is, of course, no way of enforcing the prohibitory order until you get to the third stage.

JUDGE HUFSTEDLER: All right. Now what happened, assume that is so. Is there any way the procedure does not move inexorably forward to the injunctive order stage in accordance with the statute?

MR. ANDERSON: Yes, there is. Of course, at the stage where the Postmaster General has reason to believe that the initial order is being violated he sends a complaint to the mailer.

JUDGE HUFSTEDLER: Does he have any discretion in that regard?

MR. ANDERSON: No. The addressee shall serve on sender a complaint.

JUDGE HUFSTEDLER: The next step.

MR. ANDERSON: At that point the mailer is offered a chance to respond. He may have a hearing if he requests one.

At this point the Post Office Department could determine whether in fact the complaint, in the case of mail, was a pandering advertisement.

JUDGE HUFSTEDLER: The Post Office determines that from this statute?

MR. ANDERSON: I think they would have to.

JUDGE HUFSTEDLER: What in this statute gives the Post Office Department the opportunity to make that determination?

MR. ANDERSON: Part D, if the Postmaster General after appropriate hearing determines that the order has been or is being violated.

JUDGE HUFSTEDLER: What is his determination?

MR. ANDERSON: He would have to decide at that point whether the order was valid in the first place, that is whether the addressee had complained.

JUDGE HUFSTEDLER: You take the position quite opposite apparently from the one a District Court already took contrary to your opponent's view that there is a full dress hearing in which the constitutional questions can be raised at that point.

MR. ANDERSON: I don't know which court you are talking about.

JUDGE HUFSTEDLER: Your opponent in your argument stated with respect to such hearing they were restricted to the question only. The complaint received, so on and so on. There was no discretion given to entering anything else.

MR. ANDERSON: Of course, first of all it may be they did not object to this characterization of what they sent. But I would point out if they do have some complaint about the administrative proceedings the place to raise it is in an enforcement action and not here.

JUDGE HUFSTEDLER: We are not really discussing it for that purpose. We are trying to determine whether or not an issue is presented which is in any effect right. I am simply pointing out if it is true that each step of the proceeding up to the point of actual issuance of the contempt follows as a series of inevitable steps that it makes no difference from a standing standpoint whether they step in at the time the first ad-

dressee complaint is filed or they wait until injunctive order has been issued.

MR. ANDERSON: As I pointed out, there is something that can be determined at the hearing. Furthermore, the Act in D and E only provides the Postmaster General and Attorney General are authorized to (1) for the Postmaster to require the Attorney General to go into court and (2) the Attorney General is authorized to go into court. Third, it says any District Court in the United States upon application of the Attorney General, it says may—

JUDGE CARR: I think you don't mean what you say when you say the Postmaster General doesn't have any discretion. Read the statute. Wherever it says the Postmaster General believes that the sender, isn't that for determination of the Postmaster?

MR. ANDERSON: That is correct. That is the first determination. Then at a hearing he—

JUDGE CARR: I know. But you said he had no discretion.

MR. ANDERSON: In the first case, that is when he receives a request from an addressee to issue a prohibitory order.

JUDGE CARR: Suppose they have sent him a copy of the Bible. You are going to tell me the Postmaster General would have to mandatorily carry on? Can't he say I believe that is in violation of the order? It is discretionary, isn't it?

MR. ANDERSON: Well, I would say anything that is not an absurdity, like that, and I think that would be—

JUDGE CARR: It says believed. In other words, he has to act on what he has before him. So that gives him discretion.

MR. ANDERSON: That is correct.

JUDGE REAL: Anything further?

MR. ANDERSON: No, your Honor, if there are no further questions.

In the United States District Court, Central District of California.

Daniel Rowan, etc., et al., Plaintiff, vs. U. S. Post Office Department, et al., Defendant. No. 68-1562-R.

CERTIFICATE

I hereby certify that I am duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on November 4, 1968, and that said transcript is a true and correct transcript of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of July, 1969.

Official Reporter

Memorandum of Decision.

United States District Court, Central District of California.

Filed, Apr. 30, 1969.

Daniel Rowan, doing business as American Book Service, Donald Barrsuglia, doing business as Cal-Sur Co., Chris Warfield, doing business as Home Products, Ronald Stuart, doing business as Ras Enterprises-Daro Industries, Pete Christo, doing business as Athena Products, Sol Resnick, doing business as Cameo Distributors, William Young, doing business as Bilthels Mailing Service, Floyd Clemens, doing business as Tiffany Enterprises, Lejay Winkler, doing business as Quality Products, Kevin Curley, doing business as Media Consultants, Lambert Fontenot, doing business as United Surgical, Ralph Leverson, doing business as Premier Products, Norman Arno, doing business as Norman Stacy & Associates, Norman Arno, doing business as C & A Sales, and Eve Miller, Plaintiffs, vs. United States Post Office Department; United States Postmaster General, W. Marvin Watson; Attorney General of United States, Ramsey Clark, Defendants. No. 68-1562-R.

Plaintiffs herein are all either engaged in the mail order business, distributing, mailing and selling items, books and materials through the United States mail, or in the business of buying and selling lists of names to mail order houses or both.

Each of the plaintiffs have received prohibitory orders issued by the Postmaster General pursuant to the provisions of Public Law 90-206, now codified as Title 39 U.S.C. § 4009.[1]

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[1]Title 39 Section 4009 provides:

§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designate addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(This footnote is continued on the next page)

A three-judge court convened pursuant to 28 U.S.C. § 2284 now considers the attacks of plaintiffs upon the alleged constitutional deficiencies of Title 39 U.S.C. § 4009 as applied to their mail order business. Plaintiffs complain that section 4009 is unconstitutional because:

1. It is particularly violative of free speech granted by the First Amendment of the Constitution,

2. It is violative of due process guaranteed by the Fifth Amendment of the Constitution of the United States,

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"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of Title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

3. It is vague, ambiguous, uncertain and without standards,

4. It provides an unlawful delegation of powers,

and asks that defendants be temporarily restrained and permanently enjoined from enforcing, implementing, acting upon or demanding performance pursuant to section 4009 of the United States Code, or any administrative determinations or order predicated thereon and that section 4009 be declared null and void.

The matter now comes before the Court upon motion for preliminary injunction on behalf of plaintiffs and defendants' motion to dismiss pursuant to Rule 12(b) Federal Rules of Civil Procedure.[3]

I.
THE FIRST AMENDMENT AND PLAINTIFFS' COMPLAINTS

Use of the mails for the dissemination and distribution of protected materials,[4] particularly written materials, is well within the protection and guarantee of the First Amendment of the United States Constitu-

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[3]Federal Rules of Civil Procedure, Rule 12(b) provides in pertinent part:

"Rule 12. Defenses and Objections—
When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.
• • •

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto . . . except the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . ."

[4]Reference to "protected material" includes all matter other than those declared expressly non-mailable by statute or regulation withstanding the test of constitutional validity.

tion.[4] But plaintiff does not here present a *per se* prohibition of a use of the mails. Execution of any prohibitory order requires:

1. The *addressee* in his sole discretion believes a pandering advertisement to be erotically arousing or sexually provocative, and,

2. *Notice* to the Postmaster General by the addressee and *request* by the addresee of issuance of a prohibitory order.

These provisions make it clear that we must balance free speech when it confronts an unwilling recipient's right of privacy—pre-dating constitutional considerations and constitutionally recognized in *Raines v. United States*, 362 U.S. 17; *Breard v. Alexandria*, 341 U.S. 622 and *Griswold v. Connecticut*, 381 U.S. 479.

In *Breard v. Alexandria, supra*, a municipal ordinance forbidding peddlers and canvassers from going to private residences without an invitation was upheld. The Court in considering the First Amendment claims of magazine vendors says at page 637:

> "We recognize the importance to publishers . . . of house-to-house method of selling by solicitation. As a matter of Constitutional law, however, they in their business operations are in no different position so far as the Commerce Clause is concerned than the sellers of other wares. Appellant . . ., is no more free to violate local regulations to protect privacy than are other solicitors."

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[4] *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 where Mr. Justice Holmes says:

> ". . . The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our own tongues . . ."

See also *Speiser v. Randall*, 357 U.S. 513, 518.

Plaintiffs maintain that in balancing the guarantee of First Amendment to freedom of speech and of the press and the right of privacy that the right of privacy must yield, citing to us the decision in *Lamont v. Commissioner Of Motor Vehicles*, 269 F. Supp. 880 (S.D. N.Y. 1967).

We disagree—particularly in the posture of what is proscribed by the statute here in question. Judge Frankel had before him the enjoining of a sale of lists which (1) were public records, (2) may have contained names of willing as well as unwilling recipients, and (3) were prior restraints. Here we are concerned with a statute that proscribes mailings to an *unwilling* recipient *only*. To require a commercial enterprise to strike a name from a mailing list seems little burden to impose to guarantee that dimension of privacy to an individual, otherwise helpless in his home, to "turn off" pandering advertisements which may be erotically arousing or sexually provocative to him and his family.

We accept the suggestion of validity of such a statute as pronounced by the Supreme Court in referring to 39 C.F.R. § 44.1(a)[5] in *Lamont v. Postmaster General*, 381 U.S. 301, when it says at page 310:

> "The government asserts that Congress enacted the statute in the awareness that Communist

[5] 39 C.F.R. § 44.1(a) (now § 154.1) provides in pertinent part:

§ 154.1 Delivery to persons.

"(a) Delivery to addressee. The addressee may control delivery of his mail. In the absence of a contrary order, the mail is delivered as addressed. . . . The addressee may refuse to accept a piece of mail at the time it is offered for delivery. Also, he may request his postmaster in writing to withhold from delivery for a period not to exceed 2 years specifically described items of foreign printed matter or any obscene, lewd, lascivious, or indecent matter. . . ."

> political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 C.F.R. § 44.1(a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; . . . ."

Title 39 U.S.C. § 4009 is only an implementation of the right of an individual to choose what it is he desires to see and read within his own personal sensitivity and concept of privacy.

It is summed up in *Kovacs v. Cooper*, 336 U.S. 77 at page 88—

> ". . . The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. . . ."

II.

DUE PROCESS AND PLAINTIFFS' COMPLAINT

The due process argument of plaintiff has been two-fold—(1) procedural defects and (2) confiscatory aspect of prohibitions on mailing lists.

Procedural Defects:

Title 39 U.S.C. § 4009 meets the requirements of procedural due process, i.e., notice and fair hearing. The statute in clear terms provides:

1. A request from an addressee to the Postmaster General,

2. Issuance of an order by the Postmaster General ordering the sender to refrain from further mailings to a named addressee and deletion of the name of the named addressee from mailing lists,

and without penalty of any kind for violation of the order of the Postmaster General. Upon violation of the prohibitory order:

3. The Postmaster General must serve by registered or certified mail a complaint stating the violation,

4. The sender has 15 days within which to respond to the complaint,

5. If requested by the sender—a hearing to determine whether or not a violation has occurred,

the Postmaster General is still not authorized to prohibit the delivery of *any* mail even though it may be violative of the order. Effective enforcement can only be had:

6. After request to and action by the Attorney General in petitioning to a United States district court for an order of compliance with the notice.

A violation of the order of the district court may be punished as contempt. A recitation of the procedure makes it abundantly clear that section 4009 comports to the Constitutional requirements of due process.

Confiscatory Aspects:

Plaintiff complains that section 4009 in permitting the Postmaster General to order deletion of the name of an addressee from a mailing list is unduly oppressive and amounts to a violation of due process. Plaintiffs

argue that their lists are not alphabetical and therefore the cost of deletion is approximately $5.00 per name. This estimated cost, without more, appears incredible. But, assuming that plaintiffs have accurately assessed the cost of eliminating a name from a list, such a burden does not amount to a violation of due process guaranteed by the Fifth Amendment of the Constitution. Particularly when in the context presently before this Court it is being applied to commercial enterprises.

We do not read this statute to require that a sender refrain from *any* future mailings but only from mailings of "such materials," i.e., "any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." Nor do we read the statute to prevent "sale, rental, exchange or other transaction" of a mailing list from which the name of a complaining addressee has been deleted. Plaintiffs' contentions to the contrary are without merit.

III.

VAGUENESS, AMBIGUITY, STANDARD AND UNLAWFUL DELEGATION OF POWER

Plaintiff charges generally vagueness, ambiguity, lack of standard and unlawful delegation of power. It should be noted at the outset that no effective or threatened *prohibition* of free use of the mails is effected until hearing and order of an appropriate United States district court.

The standard could hardly be clearer than provided here. For the statute provides that the sender can be ordered to refrain from mailing "erotically arousing or sexually provocative" materials, *as determined by the*

addressee, requesting issuance of an order of the Postmaster General. It is after the *first mailing* that all other proposed mailings are to be measured by the objectionable material of such first mailing.

It is only after determination of a United States district court *upon trial* and order that a sender is in danger of any penalty for mailings subsequent to the order of an appropriate United States district court but not of any order issued by the Postmaster General.

That the addressee may intitiate the process, in which eventually the Attorney General "is authorized to make application, to a district court of the United States, for an order directing compliance with such notice," as part of a comprehensive scheme to guarantee to both parties, addressee and sender, a hearing before the district court of their respective rights and duties, comports with all notions of fairness and due process expressed in the Constitution. The discretion given the addressee affects only the individual asserting his and his minor children's right of privacy. It sets no standard to be applied to anyone else or to the community at large. It does not infringe the right of any individual to accept or reject ideas in the marketplace of free expression. We find no unlawful delegation of power in validating this statute.

IV.

PRELIMINARY INJUNCTION AND THE MOTION TO DISMISS

Where injunctive relief is sought, plaintiffs must show that there is a reasonable probability that they will prevail on the merits; that the danger of irreparable damage is immediate; and that they have no adequate remedy at law.

Plaintiffs fail in each respect. The statute provides a specific remedy at law *before* plaintiffs can be compelled to do anything. We see no reason that injunctive relief should be granted.

Since no factual issue is in dispute; having determined that Title 39 U.S.C. § 4009 is constitutional and provides an adequate forum in which plaintiffs may litigate any dispute they may have with any of the defendants herein, the motion to dismiss, treated as one for summary judgment under Rule 56, as required by Federal Rules of Civil Procedure Rule 12(b), is granted.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law.

The Clerk is instructed to enter judgment for defendants.

DATED: April 30, 1969.

/s/ Charles H. Carr
Charles H. Carr
United States District Judge
/s/ Real
Manuel L. Real
United States District Judge

Concurring by separate opinion. Shirley M. Hufstedler, United States Circuit Judge.

Specially Concurring Memorandum Opinion.

United States District Court, Central District of California.

Daniel Rowan, dba American Book Service, et al., Plaintiffs, v. United States Post Office Department, et al., Defendants. No. 68-1562-R.

Filed, May 22, 1969.

Before: HUFSTEDLER, Circuit Judge, and CARR and REAL, District Judges.

HUFSTEDLER, Circuit Judge:

Although I agree that section 4009 can be sustained constitutionally, I cannot accept the reasoning of the majority opinion. In my view the statute can be salvaged by meticulously construing its provisions to shrink its loosely woven fabric to constitutional size and by applying to the statute, as thus construed, settled constitutional doctrine. It cannot be saved by submerging the First Amendment problems, as does the majority opinion, by invoking an amporphous concept of the right of privacy.

Congress enacted section 4009 in response to vocal public demand that something be done to check the flow of advertisements for erotic publications that were mailed to unwilling addressees.[1] In drafting section 4009, Congress was fully aware that it was legislating in an atmosphere permeated with the imperatives of the First Amendment as well as one charged with the emo-

[1]"Hundreds of thousands of complaints are received annually by the Post Office Department and individual members of Congress about the repeated receipt of unsolicited mail which is obscene, obnoxious, or otherwise offensive to the recipient." Senate Report No. 801, *U.S. Code Cong. & Admin. News* 2258, 2294, 90th Cong., 1st Sess. (1967).

tional voltage generated by the subject of pornography.[2] The targets of section 4009 are the commercial purveyors of pornography. Because criminal penalties for sending obscene matter through the mails have been largely ineffective in controlling the stream of printed sludge coursing through the mails, Congress devised the nonpenal regulatory scheme found in section 4009, whereby addressees can set in motion prohibitory orders to prevent senders of such material from mailing further offending matter to them.

The congressional aim is stated in the first paragraph of section 4009:

> "(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof."

The remaining provisions of the statute establish the procedure to enforce the quoted paragraph. Subsection (b) authorizes the Postmaster General, on request of the addressee, to issue an order directing the sender "to refrain from further mailings to the named addressees"; subsection (c) says that the order shall direct the sender "to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender" and "shall prohibit the sender . . . from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated ad-

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[2]Senate Report No. 801, *supra* note 1; *Hearings on H.R. 7977 Before the Senate Comm. on Post Office and Civil Service*, 90th Cong., 1st Sess. (1967).

dressees"; subsection (d) authorizes the Postmaster General to institute proceedings in the Federal District Court to enforce his prohibitory order; subsection (e) confers jurisdiction on the District Court to issue a compliance order enforceable by contempt proceedings; and subsection (h) makes inapplicable the provisions of the Administrative Procedure Act.[3]

The First Amendment challenge to section 4009 presents delicate constitutional problems. The statute is a novel combination of private and state action designed to limit the sending of a particular kind of advertising through the mails.

The right to send mail and the right to receive mail are reciprocal rights protected by the First Amendment. As Mr. Justice Holmes observed: "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ." *Milwaukee Pub. Co. v. Burleson* (1921) 255 U.S. 407, 437 (dissenting opinion); *Lamont v. Postmaster General* (1964) 381 U.S. 301, 305.

First Amendment rights are not absolutes. As precious as is the freedom of expression, that right may be burdened or otherwise restricted in favor of contravening constitutional values of such compelling proportions as to take precedence over First Amendment guarantees. (*E.g., Schenck v. United States* (1919) 249 U.S. 47; *cf. New York Times Co. v. Sullivan* (1964) 376 U.S. 254.)

The majority opinion holds that the right of an addressee not to receive mail is a "right of privacy," which

[3]The full text of § 4009 is set forth in the majority opinion.

is a constitutional right of greater weight than is the sender's First Amendment right. The interest protected by section 4009 is the addressee's interest in being free from the emotional distress he suffers from reading the contents of advertising which offends him or from knowing that his young children have been thus exposed to such advertising. The addressee's interest is a private right, but it is not a constitutional right of privacy. The term "constitutional right of privacy" is admittedly a loose one, but that concept is not elastic enough to encompass in the same category a right to be free from exposure to offensive advertising, a right to be free from the intrusion of one's home by a peddler's insistent ringing of one's doorbell (*Breard v. Alexandria* (1951) 341 U.S. 622), and the right to be free from public prying into one's marital bedroom (*Griswold v. Connecticut* (1965) 381 U.S. 479, 485).

We are not here concerned with the undisputed right of every citizen to read or refuse to read his mail, to keep it or to throw it away. We enter First Amendment territory because the Government interposes itself between the sender and the addressee's mail box to relieve the addressee from seeing some of his mail.[4] That interposition is not unconstitutional simply because private rights of addressees are favored over addressors. Not everything mailed is wrapped in impervious First Amendment paper. The extent to which the Government can restrict the use of the mail depends in large part upon what is mailed. The Government can and has forbidden the transmission of obscenity through the

[4]*Compare, e.g.,* Reitman v. Mulkey (1967) 387 U.S. 369. An individual can practise racial discrimination in pursuing his social relationships, but there are consitutional limitations on the power of the state to help him to do so.

mails. (18 U.S.C. §1461.) Obscenity is not speech protected by the First Amendment. (*Stanley v. Georgia* (April 7, 1969) 29 CCH S. Ct. Bull. B1339; *Ginzburg v. United States* (1966) 383 U.S. 463, 467-68.) The "pandering advertisements" to which section 4009 is directed are not contraband, as is apparent from the fact that such advertisements can be mailed to anyone who wants them, but it does not thereby follow that the material is completely insulated by the First Amendment.

The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. "Purely commercial advertising" has never received the same kind of constitutional protection as that afforded to expressions of greater public concern. The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales. (*Compare Breard v. Alexandria, supra,* 341 U.S. 622, *with Martin v. Struthers* (1943) 319 U.S. 141.) Commercial advertising can be reasonably regulated without offending the First Amendment. (*Valentine v. Chrestensen* (1942) 316 U.S. 52; *see Ginzburg v. United States, supra,* 383 U.S. at 474 n.17; *New York Times Co. v. Sullivan, supra,* 376 U.S. at 265-66.) When to the commercial element there is added a peculiar quality of offensiveness which adheres to solicitations appealing to the erotic interest, there is even greater public interest in sustaining Congress' scheme of regulation against a First Amendment attack. (*Cf. Stanley v. Georgia, supra.*)

Plaintiffs do not claim that their mailings which resulted in prohibitory orders are anything other than strictly commercial solicitations. Plaintiffs' affidavits

reveal that they have no desire to send their advertisements to anyone who is not interested in buying plaintiffs' wares. There is not a whisper in the record before us suggesting that the plaintiffs' publications contained any "editorial advertising," as did the newspaper advertisements discussed in the *New York Times* case. The plaintiffs are looking for customers, not converts. Indeed their real complaint about the impact upon them of section 4009 is that it costs them more than they care to pay to weed out the unwilling from their mailing lits and the merchandising value of their lists is accordingly reduced.

Were we dealing only with plaintiffs' advertising our First Amendment problems would be over. But we are not. The face of the statute is attacked for overbreadth. As plaintiffs read the statute, the addressee has been delegated the power to define "pandering advertisements" not only for himself, but also for the Postmaster General, the Attorney General, and the courts. No objective standard exists against which to measure the addressee's characterization. Even if the definition of "pandering advertisements" were not committed solely to the addressee, plaintiffs contend that the meaning of the term is so vague that no mailer can know whether or not his communication will fall within section 4009 and thus will subject him to prohibitory orders. The effect of section 4009, say the plaintiffs, is to chill communications which are fully protected by the First Amendment.

Were we compelled to read section 4009 as giving the addressee unfettered discretion finally to decide which publications mailed to him are "pandering advertisements" or were we obliged to construe the prohibitory

order authorized by section 4009 as encompassing all further mailings of any kind from the sender to the addressee, the statute would be overbroad. As thus read, the statute would regulate expression beyond the extent necessary to achieve the congressional purpose of enabling addressees to "turn off" the flow of pandering advertisements and it would cross the boundaries protected by the First Amendment. An addressee with a closed mind and a vivid imagination could decide that almost any kind of mail he received was a "sexually provocative" pandering advertisement. Congress exhibited no intent to give an addressee such unlimited power to stop communications from an addressor whose ideas were disagreeable to him.[6] But plaintiffs' sweeping construction of the statute is not compelled either by the language of the statute or by its legislative history.

As I construe the statute, the addressee is given the power to characterize the content of his mail for the purpose only of deciding whether or not he will request the Postmaster General to issue a prohibitory order. Neither the addressee nor the Postmaster General is delegated the power to decide which senders are within the purview of the statute. That power ultimately rests with the District Court and no sanctions against the sender can be applied until the District Court makes the

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[6] *See* Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 858 (1964): "If members of society can effectively cut themselves off from being contacted through the mail by different political parties, sponsors of unpopular views or any of the thousands of organizations which have messages to communicate, one major social avenue for balanced consideration of the issues of the day will have been destroyed. Government has no business encouraging isolation of individuals from the expression of views by others."

decision committed to it. (*Cf. Freedman v. Maryland* (1965) 380 U.S. 51.)

Congress defined the senders to whom the statute applies in the opening lines of subsection (a) of section 4009: "Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement. . . ." The addressee's concern is limited to that tentative identification of the sender as is necessary to permit him to frame a complaint to the Postmaster General. It is not the addresssee's burden to investigate the source of the offensive mail. Neither is it the business of the addressee to determine whether the sender is a person who has mailed "any pandering advertisement." The statute does not commit that responsibility to him. Rather, it gives him the discretion only to decide whether the advertisement "offers for sale matter which the addressee . . . believes to be erotically arousing or sexually provocative" as a prelude to potential court action.

The Postmaster General does no more than locate the sender and send to him the notice written by Congress in subsections (b) and (c). The only decisions the Postmaster General makes are the decision to file a complaint against a sender for alleged violation of the order, and a decision to pass the matter along to the Attorney General if, after a requested hearing, he chooses thus to seek enforcement of the order.

The term "any pandering advertisement" is not so vague as to draw within it communications entitled to full First Amendment protection. The "advertisement" component means commercial solicitation, an invitation to purchase a product. Congress' intent to refer to

commercial solicitation alone is evidenced by its use of the words "which offers for sale" immediately following the term "any pandering advertisement." The boundaries of "pandering" cannot be defined with the precision of a legal description of a parcel of real property, but the meaning of the term is not hopelessly elusive. As used in the statute, "pandering advertisement" means a commercial solicitation bearing on its face textual or graphic matter designed to appeal solely to the erotic interest of the addressee. (*Cf. Ginzburg v. United States, supra,* 383 U.S. at 467-68.)

Plaintiffs say that the scope of the prohibitory order prescribed by section 4009 necessarily embraces publications other than pandering advertisements, because, as they read the statute, a sender is thereby forbidden to mail anything at all to a complaining addressee. (*Cf. Summerfield v. Sunshine Book Co.* (D.C. Cir. 1954) 221 F.2d 42.) I agree with the majority that the scope of the order is not that broad, but unlike the majority, I believe it is necessary to set out the reasons for that conclusion. Plaintiffs interpret the language of subsections (b) and (c) describing the contents of the order as a direction to the sender "to refrain from further mailings to the named addressees"[6] as if it said "all further mailings of whatsoever kind." I read the words "further mailings" as a reference to "further mailings of such materials," the language of subsection (a), and

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[6]Plaintiffs find some support for their construction in the legislative history. (*E.g.,* Senate Report No. 801, *supra* note 1.) But the overriding intent was to enact a constitutional statute which would simultaneously shield senders of materials entitled to First Amendment protection from interference with their mailing rights and give to addressees offended by solicitations from commercial pornographers a remedy for their distress.

I interpret the words "such materials" as a reference to "any pandering advertisements," the term used in the opening phrase of subsection (a). Thus I read the phrase used in subsections (b) and (c) as if Congress had spelled out the words which are implied from the context of the statute: "from . . . further mailings of such pandering advertisements." (*Cf. Summerfield v. Sunshine Book Co., supra.*)

Plaintiffs argue that the effect of a prohibitory order, even as thus narrowly construed, is to deprive them of their property without due process of law. The argument assumes that plaintiffs have a property right in their mailing lists which is impaired by the prohibitory order. The assumption is a dubious one, but even if the assumption is accepted, *arguendo,* it does not help the plaintiffs. Even the plaintiffs do not suggest that they have a property right in each name on the list. All the prohibitory order does is to direct the plaintiffs to remove the names of complaining addressees before they can trade in the lists. Plaintiffs admit that the complainers are not valuable addressees and that they do not want them on their lists. They are in no position to argue that they have been hurt by a direction to jettison names which are worthless to them.

If it is assumed that plaintiffs were entitled to raise the due process argument with respect to senders other than themselves, again a dubious assumption, the statute is still immune from due process attack. The prohibitory order is not in the nature of a sanction. Nothing happens to a recalcitrant sender who refuses to comply with the Postmaster General's order. No penalty of any kind is or can be imposed until the District Court has issued a compliance order, the sender has disobeyed

that order, and the District Court has held him in contempt. (39 U.S.C. § 4009, subsec. (d) and (e).) Before a compliance order can be issued by the District Court, the sender is entitled to an adversary hearing in which he is accorded an opportunity to present fully all of his defenses, including constitutional ones. (*See Reisman v. Caplin* (1964) 375 U.S. 440.) At that hearing, the court and not the addressee, the Postmaster General, or the Attorney General decides the question: Was the sender a person who has mailed or caused to be mailed any pandering advertisement? Due process is fully satisfied by that procedure.

I conclude that section 4009 is not unconstitutional on its face or as it has been applied to the plaintiffs, under the provisions of the First and Fifth Amendments to the United States Constitution. The statute as I construe it is not overbroad and its terms are not fatally vague. It does not unlawfully delegate power to the addressees, to the Postmaster General, or to the Attorney General. Its application to the plaintiffs does not deprive them of their property without due process of law. The remaining contentions of the parties are adequately discussed in the majority opinion, or are points which require no comment.

/s/ Shirley Hufstedler
Shirley M. Hufstedler
Circuit Judge

Judgment.

United States District Court, Central District of California.

Daniel Rowan, et al, Plaintiffs, v. United States Post Office Department, et al, Defendants. Civil No. 68-1562-R.

Filed June 18, 1969.

Entered June 18, 1969.

This action came on for hearing before the specially convened three-judge court, the Honorable Shirley M. Hufstedler, United States Circuit Judge, the Honorables Charles H. Carr and Manuel L. Real, United States District Judges, presiding and the issues have been duly heard and the decision have been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing and that this action be dismissed on the merits, effective nunc pro tunc as of April 30, 1969.

DATED: This 18th day of June, 1969.

John A. Childress
Clerk, U. S. District Court

Approved as to form by:
Joseph Taback
Joseph Taback
Attorney at Law
Attorney for Plaintiffs

Presented by: Larry L. Dier, Larry L. Dier Assistant U. S. Attorney. Attorney for Defendants.
LLD: qs

OFFICE OF THE CLERK
SUPREME COURT OF THE
UNITED STATES
Washington, D. C., 20543
October 28, 1969

Joseph Taback, Esq.
8500 Wilshire Boulevard
Suite 703
Beverly Hills, California 90211

RE: ROWAN, ETC., ET AL. v. UNITED STATES POST OFFICE DEPARTMENT, ET AL. No. 399, October Term, 1969

Dear Mr. Taback:

Confirming our telegram of yesterday, the Court took the following action in the above case:

"In this case probable jurisdiction is noted and the case is placed on the summary calendar."

I enclose a memorandum describing the time requirements and procedures under the Rules and a copy of the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

JOHN F. DAVIS, Clerk
By /s/ Helen K. Loughran
(Mrs.) Helen K. Loughran
Assistant Clerk

AIRMAIL
Enclosures

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

68-1562-R

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
	For plaintiff:
DANIEL ROWAN doing business as AMERICA BOOK SERVICE, DONALD BARRSUGLIA doing business as CAL-SUR CO., CHRIS WARFIELD doing business as HOME PRODUCTS, RONALD STUART doing business as RAS ENTERPRISES-DARO INDUSTRIES, PETE CHRISTO doing business as ATHENA PRODUCTS, SOL RESNICK doing business as CAMEO DISTRIBUTORS, WILLIAM YOUNG doing business as BILTHELS MAILING SERVICE, FLOYD CLEMENS doing business as TIFFANY ENTERPRISES, LEJAY WINKLER doing business as QUALITY PRODUCTS, KEVIN CURLEY doing business as MEDIA CONSULTANTS, LAMBERT FONTENOT doing business as UNITED SURGICAL, RALPHLEVERSON doing business as PREMIER PRODUCTS, NORMAN ARNO doing business as NORMAN STACY & ASSOCIATES, NORMAN ARNO doing business as C & A SALES, and EVE MILLER,	Gold, Herscher & Taback 8500 Wilshire Blvd # 703-05 Beverly Hills, Calif 90211 OL 2-0490 or OL 5-5163
Plaintiffs,	For defendant:
-vs-	
UNITED STATES POST OFFICE DEPARTMENT; UNITED STATES POSTMASTER GENERAL, W. MARVIN WATSON; ATTORNEY GENERAL OF UNITED STATES, RAMSEY CLARK,	
Defendants.	
COMPLT & PETN FOR DECLARTY RELIEF, TRO, PRELIM & PERM. INJNCTN TO ZØ DECLARE 39 USC 4009 UNCONSTITUTIONAL.	

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.
J.S. 5 mailed	Clerk			5/28/69	Gold &	13	-	9-20
				5/28/69	Taback	5	- (appl)	6-3-69
J.S. 6 mailed	Marshal							
Basis of Action:	Docket fee							
	Witness fees							
Action arose at:	Depositions							

3 Judge Court - Judge Real, Judge Carr & Judge Hufstedler

68-1562 R Daniel Rowan etc et al -vs- U.S. Post Office et al 68-156

DATE	PROCEEDINGS	Date Order or Judgment Noted
9/18/68	Fld Comptl & petn for declaratory relief TRO, Prelim and Perminant injnctn and request for 3 Judge Courtto declare Title 39 USC 4009 unconstitutional. Issd summs - Md JS-5. Fld Affid of Joseph Taback in support of complt & petn for declaty relief, TRO, Prelim & Perm Injnctn & request for 3 Judge Court. Fld Notc of Mot & Mot for Grantg of Prelimy Injnctn with pts and authors in support, retnble 10/28/68, 10am.	
9/23/68	Fld Notification and Certificate of Judge Real for a three judge Court. Mld copy to Judge Chambers.	
10/7/68	Fld summs retd svd as to all defts (USA).	
10/14/68	Ord, on ct'w own mot, that hrg on pltf's mot for prelim injunc set for 10/28/68, is cont'd to 11/4/68, 10am.	
10/18/68	Fld pltfs notice of cont of hrg frm 10/28/68 to 11/4/68.	
10/22/68	Fld defts US Post Office Dept, W. Marvin Watson & Ramsey Clark, notice of motn & Ord (R) prescribing time for hrg, retble 11/4/68 10am to dismiss. Fld motn of sd defts to dismiss; Fld memo in oppos to plfs' motn for a prelim injunction and in suppt of defts' motn to dismiss; Fld oppos of defts to plfs' motn for a prelim injunction. Copies to Judge Real, Carr and mld copies to Judge Hufstedler, 312 No. Spring St., L.A. Calif.	
10/23/68	Fld stip & Ord (R) that time for defts to file their oppos to plfs' motn for granting of Prelim Injnction be extended to and incldg 10/21/68 and that the plfs may hv until 10/28/68 to file their reply. Copies to Judge Real and Judge Carr. Mld copy to Judge Hufstedler, 312 No Spring St, L.A. Calif.	
10/28/68	Fld plfs' memo in suppt of plfs' motn for prelim injunction and declaration that 39 USC § 4009; Fld Affid of LeJay Winkler; Fld Affid of Virginia Ann Yedding; Fld Affid of Molly Fontenot; Fld Affid of Floyd Clemens. Copies to Judge Real, Judge Carr and mld copies to Judge Hufstedler, 312 No Spring St., L.A. 16th Floord.	
11/4/68	Hrg plfs mot for prelim inj & defts mot for dismissal & ord cause stand submitted.	
4/30/69	Fld memo of decision & ord thereon that jdgmt be fv deft's & dismng action. (Ent 4/30/69 mld copies & ntfd prtys) JS-6	
5/22/69	Fld Specially concurring Memorandum opinion from Judge Shirley M. Hufstedler, Circuit Judge. (Clerk of 9 CCA to ml cys)	
5/28/69	Fld plfs' NOTICE OF APPEAL. Copy to Judge Real, Judge Carr and mld copy to Judge Hufstedler, L.A., Calif. Fld Plfs' proof of service re Noticeof Appeal.	
5/29/69	Mld copies of Memo of Judge Hufstedler fld 5/22/69 to all cnsl. (copies to (CC) & (R))	
6/3/69	Fld plf's & Appellants request & designation of record to be prepared,	
68-15	certified and transmitted to the US Supreme Court. Fld Proof of serv.	
6/18/69	Fld jdgmt dismng action on the mrts, that pltfs take nthng, that jdgmt is fld nunc pro tunc as of April 30, 1969. (Ent 6/18/69) JS-6	
7/22/69	Issd and fwd to U.S. Supreme Court orig rec on appeal.	

Supreme Court of the United States

No. 399 ------ , *October Term, 19* 69

Daniel Rowan, dba American Book Service, et al.,

Appellants,

v.

United States Post Office Department, et al.

APPEAL from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

October 27, 1969